POWER OF A STATE TO DIVERT AN INTERSTATE RIVER.[1]

IT is believed that the city authorities of Boston are considering the possibility of taking water from the Nashua River to supply the inhabitants of the city. The Nashua River rises in Massachusetts, and flows thence into New Hampshire, where it empties into the Merrimack. At Nashua, N. H., the Nashua and Jackson Manufacturing Companies have large mills, the power for which is furnished by the Nashua River; and this water-power would, it is apprehended, be seriously impaired by the proposed diversion of the river to supply Boston. It is supposed that Boston may purchase a strip of land on the banks of the Nashua River, at some point in Massachusetts, distant about thirty miles from Boston, and may then apply to the legislature of Massachusetts for an act authorizing the diversion of the river, with a provision for ascertaining and paying the damages to lower riparian proprietors in Massachusetts, and possibly with a like provision in reference to the riparian proprietors in New Hampshire.

The Nashua and Jackson Manufacturing Companies desire an opinion as to the power of the Massachusetts legislature to authorize such diversion of the river, either with or without a provision for compensation to the New Hampshire riparian proprietors.

We cannot bring ourselves to believe that such an act, in either form, will be passed by the Massachusetts legislature. But, for the purposes of this discussion we will assume that the act has been passed in Massachusetts without any concurrent legislation in New Hampshire, that the city authorities are attempting to carry it out, and that the Nashua Manufacturing Company has brought a bill in equity in the United States Circuit Court for the District of Massachusetts against the city of Boston and its agents, praying that they may be enjoined from diverting the water. What decision would be given?

[1] This article, in substance, consists of an opinion given by the writers, in January, 1894, as counsel consulted in behalf of the Nashua and Jackson Manufacturing Companies. No legislation, such as is herein discussed, has yet taken place; and conquently there is no litigation pending on this subject.

This question is considered, for the present, upon two assumptions: 1, that the proposed diversion would result in substantially impairing the water power at Nashua; 2, that the Nashua River is not "navigable" in the legal sense of that term.

The city of Boston, by becoming a riparian proprietor (by purchasing land on the banks of the Nashua River at a distance of thirty miles from the city), could not thereby acquire the right to take water from the river for the supply of the citizens, — could not acquire the right to take water from the river in sufficient quantities to supply the domestic wants of its inhabitants.[1]

The diversion of the water by the city, if done without legislative authority, would be a tort. The New Hampshire mill-owners could proceed against the city or its agents, either in a Court of Equity for prevention, or in a Court of Law for the recovery of damages. And they could maintain such proceedings *in Massachusetts*, either in the State Court or in the United States Circuit Court for the District of Massachusetts.[2]

Such a taking could not be constitutionally authorized by the Massachusetts legislature, as against Massachusetts riparian owners, unless provision were made for compensation. It would be regarded as a taking of the property of the lower owners on the Massachusetts banks of the river.[3] It is taking an easement in

[1] City of Emporia *v.* Soden, 25 Kansas, 588; s. c. 37 Am. Rep. 265; Stein *v.* Burden, 24 Alabama, 130, pp. 146–147; Lord *v.* Meadville Water Co., 135 Penn. St. 122; s. c. 19 Atl. Rep. 1007; 2 Lewis Am. R. R. & Corp. Rep. 744; and see note page 746. ENDICOTT, J., in Ætna Mills *v.* Brookline, 127 Mass. 69, p. 72.

[2] Foot *v.* Edwards, 3 Blatchford, 310; Rundle *v.* Delaware, &c. Co., 1 Wallace, Jr. 275; GRIER, J., pp. 288–290; Rutz *v.* St Louis, 7 Fed. Rep. 438; Manville Co. *v.* Worcester, 138 Mass. 89; 6 Criminal Law Magazine, 168–173. See also Burk *v.* Simonson, 104 Indiana, 173, p. 179. (The decision in Worster *v.* W. L. Co., 25 N. H. 525, is opposed to the great weight of authority. It is based on the erroneous supposition that the so-called rule in Bulwer's Case has become obsolete; whereas that rule prevails in most jurisdictions to-day.)

[3] Lewis on Eminent Domain, ss. 61 and 62; 78 Maine, pp. 132 and 134.

This doctrine was not questioned in the much-discussed case of Watuppa Reservoir Co. *v.* Fall River, 147 Mass. 548, commented upon in 2 HARV. LAW REV. 195, 316, and 3 HARV. LAW REV. 1. The decision of the majority was based on the alleged absolute power of the State, under the Colony Ordinance, over the waters of "great ponds." The point actually decided in a recent Minnesota case (Minneapolis Mill. Co. *v.* Water Com'rs of St. Paul, 58 N. W. R. 33; 8 HARV. LAW. REV. 62) also related to the taking of water from a pond; but the court did not apparently rely an any special reservation of State authority over ponds, and the opinion seems to apply the principle to rivers also. The court appear to proceed upon the theory that the State is absolute owner of the bed of the Mississippi River, a doctrine not likely to be contended for in the case of the Nashua River.

the riparian proprietor's land.[1] The proprietor has a right that the stream shall continue to flow to his premises in its natural way. "This right is a part of his property in the land and in many cases constitutes its most valuable element."[2] The Massachusetts legislature can, by making provision for compensation, constitutionally authorize such taking or diversion, as against lower riparian proprietors in Massachusetts. But it does not follow that the Massachusetts legislature can thus authorize the taking as against lower riparian proprietors in New Hampshire.

Because Massachusetts can compel a sale of property in Massachusetts, it does not follow that it also can compel a sale of property in New Hampshire. Massachusetts has not the power to compel a New Hampshire riparian proprietor to sell his right (annexed to and arising out of his New Hampshire land), that the water of the river should continue to flow to his land. A State cannot exercise the power of eminent domain extra-territorially. Massachusetts cannot condemn land in New Hampshire.[3] Massachusetts cannot, as against a citizen of New Hampshire, authorize the doing of an act in Massachusetts which will result in the taking of property rights in New Hampshire. Massachusetts could not authorize the building of a dam in Massachusetts which would flood land in New Hampshire.[4]

By parity of reasoning, Massachusetts could not authorize the construction of an aqueduct or canal in Massachusetts which would divert water from a stream naturally flowing to New Hampshire. The right infringed by flooding New Hampshire land may be called absolute ownership. The right infringed by diverting water from New Hampshire land may be called an easement. The consequence in the one case may be positive, and in the other case negative. But in each case it is a property right that is infringed; and the consequence is as direct in the latter case as in the former.[5]

Possibly it may be argued that the New Hampshire riparian owner's right to have the stream flow from Massachusetts to his

[1] 45 Am. Rep. pp. 661–662.

[2] Lewis on Eminent Domain, s. 61. KNOWLTON, J., 147 Mass. p. 561.

[3] Crosby *v.* Hanover, 36 N. H. 404; Randolph on Eminent Domain, s. 28.

[4] APPLETON, J., in Worster *v.* G. F. M. Co., 39 Maine, 246, p. 250. LADD, J., in Salisbury Mil's *v.* Forsaith, 57 N. H. 124, p. 127; I. W. SMITH, J., in Same Case, p. 131.

[5] See HOLMES, J., 138 Mass. p. 90; Saunders *v.* Bluefield, &c. Co., 58 Fed. Rep. 133; Randolph on Eminent Domain, s. 28.

land in New Hampshire is a right of property *in Massachusetts*, and hence can be taken by the Massachusetts power of eminent domain. But this position is not tenable. The fact that the New Hampshire riparian owner may bring an action in Massachusetts does not necessitate the conclusion that his injured property is in Massachusetts. His property right in New Hampshire is injured by a tort in Massachusetts. The damage occurs in New Hampshire. The act that occasioned the damage was done in Massachusetts. Hence the law permits an election of remedies. Two things are required to give an action: 1, property in the plaintiff; 2, a violation by defendant of plaintiff's property right. If the property damaged is in one State, and the act which caused the damage is done in another State, the better view is that there may be an action in either State; in the State where the act was done, or in the State where the damage resulted. The reason is that otherwise there might often be a failure of justice from want of a remedy practically available.

The right of the New Hampshire riparian owner to have the stream flow to his land is a property right in New Hampshire. It is an easement annexed to his land in New Hampshire.[1] This is put with great distinctness by Judge Story, in Slack *v.* Walcott, 3 Mason, 508, p. 516. In that case, the plaintiff owned a mill in Massachusetts on a river which formed the boundary between Massachusetts and Rhode Island. The defendant diverted water from the river on the Rhode Island side. STORY, J., said of the plaintiff's right: "The right, however, is not a distinct right to the water, as *terra aquâ coöperta*, or as a distinct corporeal hereditament, but as an incident to the mill, and attached to the realty. It passes by a grant of the mill, and has no independent existence. It is not real estate situated in Rhode Island. It is an incorporeal hereditament annexed to a freehold in Massachusetts. And a conveyance of the mill, good by the laws of the State where the mill is situated, conveys all the appurtenances. The wrong done by stopping the flow of the water by any obstruction or drain in Rhode Island is an injury done to the mill itself in Massachusetts. In a just sense, the wrong may be said to be done in both States, like the analogous case of an injury to land lying in one county by an act done in another county."[2] So the correlative right of the

[1] See 45 Am. Rep. 661-662. KNOWLTON, J., 147 Mass. pp. 561, 566-567.

[2] For decisions as to the locality of water-power for purposes of taxation, see Boston Mf'g Co. *v.* Newton, 22 Pick. 22, Pingree *v.* County Comr's, 102 Mass. 76; Boston Water

Massachusetts riparian owner that the river shall not be obstructed in New Hampshire so as to flow back and flood his Massachusetts land is a property right in Massachusetts, although this Massachusetts right may be violated by an act done in New Hampshire.

If then the right of Massachusetts to do this injury to the New Hampshire riparian owner cannot be justified under the Massachusetts power of eminent domain, it must be justified, if at all, under Massachusetts' general power of sovereignty. And it follows that, if Massachusetts has the power at all, it has the power untrammelled by any necessity of making compensation to the New Hampshire proprietors. For it is only when there is a taking under eminent domain that the necessity for compensation exist.

The question then is, has Massachusetts the power to do this uncompensated injury to the New Hampshire proprietors — not the power to compel them to sell their rights at a valuation to be fixed by third parties — but a power to utterly destroy their rights without giving any equivalent whatever?

The claim of the city will probably be: —

1. That Massachusetts, as a sovereign State, has the right to do the acts in question.

2. That even if such acts of the State are not justifiable by the rules of so-called international law, still neither the State nor its agents can be called to account in a court of justice for the doing of the acts; or, in other words, that there is no enforceable remedy in a court of justice either against the State or its agents.

In support of the first position, the city will probably cite a *dictum* in Mannville Co., *v.* Worcester,[1] and the decision of the Supreme Court of Massachusetts in Brickett *v.* Haverhill Aqueduct Co.[2] And it will probably be contended that the latter case is an authority directly in point to sustain the supposed pretension of Massachusetts; and that the *ratio decidendi* is to be found in the *dictum* in the earlier case, which, it will be said, is to the effect that Massachusetts can (lawfully) "authorize any acts to be done within its limits, however injurious to lands or persons outside them."

In support of the second position, the argument for defendant will probably be in substance as follows: Massachusetts is a sov-

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Power Co. *v.* Boston, 9 Met. 199, 204; Cocheco Mf'g Co., *v.* Strafford, 51 N.H. 455, 461-463, 466, 467, 469; State of Minnesota *v.* Minneapolis Mill Co., 26 Minnesota, 229.

[1] 138 Mass. 89, p. 90.

[2] 142 Mass. 394.

ereign State. If a sovereign State does, or authorizes, an act injurious to the person or the property of some individual who is not a citizen of that State, the transaction is not the subject of investigation or redress in the courts of that State or of any other State. In a suit against the individual doing the act, it is a good plea that it was an Act of State, done by him under the authority of his own government. The diversion, by Massachusetts authority, of the Nashua River does not constitute an injury redressible by the courts, inasmuch as it falls within the class of transactions known as Acts of State. Such acts of a sovereign State "can be called in question only by war, or by an appeal to the justice of the State itself." Such transactions are not governed by the laws which municipal courts administer. They will not be examined into by the courts of the State which authorized the acts. Nor can they effectually be inquired into by the courts of any other State. The latter courts have not the means of deciding what is right; *i. e.*, "they have no *authoritative* legal standard or measure for such cases;" nor have they in general "the power of enforcing" by legal process "any decision which they may make." The term "international law" is a misnomer. Law is here used only in the sense in which we speak of the "laws of society" or the "code of honor." There are no "sanctions," no commands propounded by a political superior to a political inferior, and enforced by legal penalties to be incurred in case of disobedience. Even if, by the *consensus* of mankind, a wrong has been done, "it is a wrong for which no municipal court can afford a remedy." The alleged private right of action is treated as "merged in the international question which arises between" the State doing the act and the other State of which the injured person is a subject.[1]

We deny both the claims supposed to be advanced in behalf of Massachusetts. We take issue, both as to the right of Massachusetts to do the act, and also as to the absence of legal remedy on the part of citizens of New Hampshire.

Massachusetts, even if an entirely distinct and independent sovereignty, — even if standing to New Hampshire in the relation of France to Spain, — would not have a right, under the rules of international law, to do this act. The law of nations recognizes no such right, even between States wholly foreign to each other.

[1] 2 Stephen's History of Criminal Law of England, 61–65; Pollock on Torts 2d Eng. ed. 98–100; Clerk & Lindsell on Torts, 27, 28; Holmes's note, 1 Kent Com. 1, quoting Austin.

The United States government treats the diversion or obstruction of the ordinary flow of water, when caused by foreign nations, as a national grievance, affording ground for national complaint.

In 1880, Secretary Evarts wrote to the United States minister at the Mexican capital, and also to the Mexican minister at Washington, complaining that the Mexicans on the western shore of the Rio Grande are in the habit of diverting, into ditches dug for that purpose, all the water that comes down the river in the dry season, thereby preventing our citizens on the Texan shore from getting sufficient water to irrigate their crops. He said that this practice is "in direct opposition to the recognized rights of riparian owners," and that it "might eventually, if not amicably adjusted through the medium of diplomatic intervention, be productive of constant strife and breaches of the peace between the inhabitants of either shore." In 1884, Secretary Frelinghuysen wrote to the United States minister at the British Court, that the erection of works on the Meduxnikik River in New Brunswick, in such a way as to obstruct the flow of water in Maine, and to injure the lumbering business in that State, is a proper subject for diplomatic interposition by this government. [1]

Where a river flows successively through two sovereign States, there has been much dispute as to the right of one of the States to exclude the people of the other State from navigating that part of the river which flows through the territory of the former State. Thus if Massachusetts and New Hampshire were each independent nations, and the Nashua River were a navigable stream, it would be a question whether Massachusetts could deny to the people of New Hampshire the right to navigate the waters of the Nashua River while and so long as those waters flow between Massachusetts banks. Our national government has objected strenuously against the right to exclude. Thus it denied the right of Spain to exclude our citizens from the navigation of the lower part of the Mississippi River before the Louisiana cession of 1803; and has also questioned the right of Great Britain to exclude the United States from the St. Lawrence. One high authority on international law sustains the position of our government. The weight of modern authority seems against it; though it should be noted that one of the leading English writers upon international law, while inclining to the view that the exclusion may be grounded

[1] 1 Wharton's International Law Digest, § 20.

"upon strict law," says that it is a harsh exercise of "an extreme and hard law;" and he expresses a hope "that this *summum jus*, which in this case approaches to *summa injuria*, may be voluntarily abandoned by his country." [1]

With the settlement of this mooted point we are not now directly concerned. But if the right to exclude in such a case has been seriously questioned, and has been made the subject of prolonged diplomatic controversy, what will be the fate of the far more radical claim set up in the present case? Can it find support from the doctrines of international law? The present contention goes far beyond a denial of New Hampshire's right to navigate, *in Massachusetts*, a river flowing through both States. Massachusetts, instead of merely denying New Hampshire's right to use, *in Massachusetts*, that part of the river which naturally flows through Massachusetts, is, in effect, denying New Hampshire's right to use, *in New Hampshire*, that part of the river which naturally flows through New Hampshire. Massachusetts, instead of saying to New Hampshire, "You shall not hereafter use, in Massachusetts, that part of the common river which flows through Massachusetts," makes a far more startling declaration. Massachusetts says to New Hampshire, "You shall not hereafter have the use of the river, even within your own borders, for Massachusetts denies your right to have any part of the river flow through New Hampshire." Can it be doubted that, as between two nations wholly foreign to each other, such a claim, if persisted in, would be cause for war?

Even if, then, Massachusetts occupied the position of an independent nation, she would have no right to authorize the doing of this act; although, in the event of her wrongdoing, their might be a difficulty in finding an effective remedy in a court of justice. But Massachusetts does not stand to New Hampshire in the relation of one independent nation to another. On the contrary, Massachusetts is a part of the same nation with New Hampshire. They are sister States; each being protected against the aggressions of the other by the Federal Constitution; and the citizens of each having a remedy in the Federal Courts against the citizens of the other who commit injuries under the attempted, but invalid, sanction of their State.

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[1] See Pomeroy, International Law, §§ 131–138 (quoting 1 Phillimore, Int. Law, 185). Compare 1 Kent's Com. 35, 36.

If this act would be cause for national complaint, or for war, if done by one foreign nation to another, then the doing of it by one State of this Union to the injury of the people or land of a sister State, is a violation of the Constitution of the United States. The Federal Constitution impliedly prohibits such aggressions by one State or its citizens upon another State or its citizens as would afford just cause for governmental complaint if the two States were each independent nations, — such aggressions as would between distinct sovereignties constitute an international grievance, and, if persisted in, afford cause for war. The different States, by assenting to the Constitution, and becoming members of the Federal Union, impliedly agree not to do any acts to the injury of each other, or to the injury of the people of each other, which would violate the rules of international law. The States give up the right to vindicate their respective claims by war, or to settle them, without the consent of Congress, by interstate treaties. As a substitute for the rights of the States to resort to war, a system of common judicial tribunals is established to adjudicate their controversies, and the controversies between their respective citizens. In construing the Constitution, we may reason "from its spirit, and from the general character of the nationality implied all through its separate parts, — as in its avowed purpose to form a more perfect union and insure domestic tranquillity, in its prohibition of [war and] subordinate alliances among the States, in its reference of every controversy between them to the judicial branch of the united government." In 108 U. S. p. 90, WAITE, C. J., said: "All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, enter into any agreement or compact with another State. Art. I., Sec. 10, cl. 3."[1]

The statutes of the States are not the supreme law of the land within their respective limits. The Constitution of the United States is the supreme law of the land. "The mandate of the State affords no justification for the invasion of rights secured by the

[1] See also 1 Hare, Const'l Law, pp. 15, 16, p. 52; Pomeroy, Const'l Law, 9th ed., s. 43.

Constitution of the United States." MATTHEWS, J. 114 U. S. p. 292. By adopting the United States Constitution and joining the Union the State has parted with its "sovereign right of judging in every case on the justice of its own pretensions."[1] The question of the validity of State action thenceforth "ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court to be decided by its judgment;" the court being "bound to act by known and settled principles of national or municipal jurisprudence, as the case requires."[2] To "insure domestic tranquillity" is one of the objects expressly enumerated in the preamble to the United States Constitution. The otherwise imminent danger of war between the States is one of the prominent reasons urged by Hamilton in the Federalist for adopting the Constitution.[3] And great stress was laid by the same writer on the necessity of conferring jurisdiction upon the Federal judiciary to settle disputes between States, and also disputes between citizens of different States. "If such disputes could not be brought before the Courts of the Union there would be no effectual means of settlement, and the difficulty might result in interstate war."[4] "Whatever practices may have a tendency to disturb the harmony of the States, are proper objects of Federal superintendence and control."[5]

"The act," it will be said, "which gives rise to the injury is an act done *in Massachusetts.*" True; but its operation, its inevitable operation, is not confined to the limits of that State. If the plea that the act was done in Massachusetts is allowed as a perfect defence, it can also be used to justify damming in Massachusetts (close to the State line) a river flowing from New Hampshire to Massachusetts, and thus flooding New Hampshire territory by back water. In this way, by damming the Merrimack, Massachusetts might destroy the border city of Nashua, perhaps not more certainly, but more speedily, than by the present attempt to divert the source of its water power. So, if this plea be valid, Massachusetts can undermine the entire strip of Massachusetts land adjoining the New Hampshire boundary, and can explode the mine without any liability on the part of its agents for the inevitable result of upheaving the soil and demolishing the buildings on the New Hampshire side of the line. In the well-known case of City

[1] See 6 Wheaton, p. 380.
[2] Compare BALDWIN, J., 12 Peters, p. 737.
[3] Federalist, Numbers 6 and 7.
[4] 2 Hare, Const'l Law, p. 1024.
[5] Federalist, Number 80.

of New York *v.* Miln,[1] there was a difference of opinion among the judges as to whether the statute there in question was within the power possessed by the State to enact municipal legislation, — the power to legislate on matters of internal police. But both the majority and the minority agreed that the States have no authority to pass laws which act upon subjects beyond their territorial limits; and that a valid State statute must be one "whose operation was within the territorial limits of the State." (Compare BARBOUR, J., 11 Peters, p. 139; and STORY, J., 11 Peters, p. 156.)

The question has thus far been discussed as if the different States had each possessed full power of sovereignty from the date of their first settlement up to the adoption of the present Federal Constitution. But it is matter of common knowledge that this assumption is without foundation. Prior to the Revolution the colonies were not thirteen separate and independent nations. Each "was a dependency and a part of the British Empire." "The Declaration of Independence was not the work of thirteen separate colonies, each acting in an assumed sovereign capacity, but of the United Colonies acting in a national capacity through their delegates in Congress assembled." As soon after the Declaration as there was time to ascertain and formulate the popular wish, in 1777, Articles of Confederation were adopted by Congress, and were ratified the following year by most of the colonies (including Massachusetts and New Hampshire).[2]

Not only is it true that Massachusetts and New Hampshire were not formerly independent nations, but it is also true that they were both subjects of the same power. Their domains did not originally belong to different sovereignties, and were not originally granted by different European Powers; as, for example, Florida under the rule of Spain, and Georgia, subject to the dominion of Great Britain. Did the King of Great Britain, in chartering these respective colonies of Massachusetts and New Hampshire, intend to give each the right to destroy the other? At that time the rivers and the water-power were the important features of the country. Must not the King's grants of these two colonies be taken as each subject to the implied reservation or condition that neither province should materially change the course of streams flowing from one to the other? If such a condition can plausibly be contended

[1] 11 Peters, 102.

[2] See Pomeroy, Const'l Law, ss. 47, 52, 53, 59. Compare BALDWIN, J., 12 Peters, p. 748.

for in case of an artificial watercourse (an apparent, continuous, and reasonably necessary easement) extending across adjacent lots held by different parties under titles derived from a common grantor, can it fail to apply to grants by one and the same sovereign of adjacent provinces crossed by natural streams? Was the Confederation of 1777–78, or the Constitution of 1787, intended to enlarge the powers of the respective colonies to harass and annoy, not to say destroy, each other? Was the United States Constitution adopted with the view of conferring on each State power to inflict injuries upon sister States,—injuries of a nature which none of them had hitherto possessed the right to inflict, and which would not be justifiable under the rules regulating the intercourse of civilized nations?

In this connection it should be carefully noted that the rights claimed for the New Hampshire riparian owners are *jure naturæ*, the river being a natural stream, and the law being a recognition of the course of nature in every part of the stream. No artificial servitude has been forced upon Massachusetts territory along the banks of the Nashua River by the Nashua Companies, restricting the natural enjoyment of the use of the water which they once had, but the Nashua Companies have simply enjoyed that which was left after riparian owners in Massachusetts enjoyed their natural privileges.[1] Rights like these are not created by toleration or the unreasonable deprivation of the Massachusetts riparian owners. The conduct of these sister States towards each other and the common law which prevailed while they were colonies, sanctioned the confidence that such property rights had locality, and that under that view they would be as permanent and inviolable as the mills to which they were by natural law attached. That confidence was based upon the history of similar water rights in the lands from which the colonists came, as elsewhere, and became the foundation of great investments, and gave rise to the growth of large cities.

What results would follow if the opposite view is adopted? Let us look at the consequences of conceding to each State the full power of sovereignty supposed to be now claimed for Massachusetts. Consider, first, the consequences in respect to dealings with

[1] Gould on Waters (2d ed.) pp. 300, 301, 302; Yates *v.* Milwaukee, 10 Wall. 497; Lyon *v.* Fishmonger's Company, L. R. 1 App. Cas. 662; Diedrich *v.* N. W. Ry. Co., 42 Wis. 248; Stevens Pt. Boom Co. *v.* Reilley, 44 Wis. 295, 305; Morrill *v.* St. Anthony Falls Co., 26 Minn. 222.

foreign nations; second, the consequences with respect to dealings with sister States.

If each State possesses this full sovereignty, it may at any time do acts which will surely embroil itself in war with foreign nations, a war which may result disastrously and may involve other States in international difficulties. Both the border States and the seaboard States would be peculiarly liable to such troubles; and the Constitution was framed with the express view of preventing such occurrences. The inadmissibility of this claim of sovereign power on the part of a State is clearly pointed out by Judge Story. "The States, as such, are not known in our intercourse with foreign nations, and not recognized as common sovereigns on the ocean. And if they were permitted to exercise criminal or civil jurisdiction thereon, there would be endless embarrassments arising from the conflict of their laws, and the most serious dangers of perpetual controversies with foreign nations. In short, the peace of the Union would be constantly put at hazard by acts over which it had no control, and by assertions of right which it might wholly disclaim." [1]

Equally alarming consequences will result from the doctrine that a State may, with impunity, authorize aggressions upon the property of the citizens of a sister State. If it be established that the agents of the authorizing State cannot be called to account in the Federal Courts for their acts, then, in all cases of serious injury, one of three results must follow, either (1) the assailed State must submit to gross injustice; or (2) laws will be passed of a retaliatory nature; such as were actually passed by three States "during the steamboat controversy," and which "threatened the safety and security of the Union;" [2] or (3) the injured State must resort to the right of revolution, secede from the Union, and go to war with the aggressive State.

If the aggrieved State had never become a member of the Union, the right of making war would have been left to her as a last resort. But when New Hampshire entered the Union, she expressly gave up the right of making war, or conclude a treaty of peace. Her hands are tied. "Bound hand and foot by the prohibitions of the Constitution, a complaining State can neither treat, agree, or fight with its adversary without the consent of Congress." [3] Does she

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[1] Story on the Constitution, s. 1673.

[2] Story, J., 11 Peters, 159–160.

[3] Sec. 12 Peters, p. 726.

give up all these rights under the Constitution and receive nothing in return? A resort to the judicial tribunals of the Union must certainly be left to her and to her citizens. She may litigate disputes with the aggressive State; and her citizens may have remedies against the citizens of the other State who have committed torts under the unfounded assumption that they had valid State authority for their doings. The Federal tribunals must say that, inasmuch as, under the Constitution, the States cannot make war upon each other, they cannot constitutionally do to each other such acts as would be occasion for war between independent nations.

Thus far we have not relied upon the Fourteenth Amendment to the United States Constitution. We have maintained, and we believe, that the Constitution as it stood before the passage of that amendment prohibits State legislation of this description. But if this position is held erroneous, it would certainly seem that the Fourteenth Amendment must be construed as prohibitive of such legislation. That amendment is in part as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." This amendment was intended to afford national protection to property rights in all States, as against aggression attempted under State statutes. There is no sufficient reason for considering it as intended to protect property rights in any particular State only as against the aggression of that State, and not as against the aggression of any other State. There is no ground for limiting the words "any person" in the clause prohibiting deprivation of property to persons within the territorial jurisdiction of the State (as in the following clause which says "any person within its jurisdiction"). It is settled that the requirement of "due process of law" is not satisfied by the formal enactment of a statute; it must be a valid statute, one which the legislature had power to enact. The legislature of one State has not power to compel a citizen of another State to part with his property rights in that other State for a price to be fixed by third persons. Hence a statute providing for such compulsory extra-territorial purchase is not "due process of law."

If the foregoing views are correct, it follows that New Hampshire riparian proprieters have effective remedies in the United States Circuit Court for the District of Massachusetts; remedies either

preventive or compensatory. They may enjoin individuals or corporations from attempting to carry out the Massachusetts statute, or they may recover damages after the wrong has been done.

Nor does the Eleventh Amendment to the United States Constitution stand in the way. That amendment prohibits suits in the United States Courts *against a State* by citizens of another State. But it does not prohibit suit against the individuals who undertake to act as agents or officers of a State, in a case like the present. This is conclusively settled by the decisions of the Supreme Court of the United States.

The Eleventh Amendment does not apply to the "class of cases where an individual is sued in tort for some act injurious to another in regard to persons or property, to which his defence is that he has acted under the orders of the 'State' government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him."—MILLER, J.[1] To complete his defence he must produce a *valid* statute of the State, authorizing what he is doing. The Court rejects "the extravagant proposition that a void act can offord protection to the person who executes it."—MARSHALL, C. J.[2] Suits may be maintained "against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs. If the State legislation under which the defendant attempts to justify is held null and void, he is left defenceless; and legal proceedings may be taken against him "in those instances where the act complained of, considered apart from the official authority (ineffectually) alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character."—MATTHEWS, J.[3] One of the early and leading cases on this subject has since been summarized as follows: "The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the State. This they were not permitted to do, because

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[1] 109 U. S. p. 452.
[2] 9 Wheaton, p. 839.
[3] 123 U. S. pp. 500, 501, 502.

the authority under which they professed to act was void,"[1] If a suit at law may be maintained against the agent to recover damages for his acts done in execution of a void statute of the State, it follows that a court of equity on a proper case will restrain him by injunction from attempting to commit the wrong. "It being admitted, then," said MARSHALL, C. J.[2] "that the agent is not privileged by his connection with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?" That the remedy by injunction may be applied in such cases does not now seem open to doubt.[3]

For the sake of argument we have assumed that the city of Boston, or its board of water commissioners, are to be regarded as occupying the position of officers or agents of the State, acting under the peremptory command of the State. But it may well be questioned whether a municipality, acting by permission of the State to bring about a benefit peculiar to itself, stands like an officer obeying a peremptory governmental order.

The above positions as to the non-applicability of the Eleventh Amendment are so thoroughly sustained by the decisions of the Supreme Court of the United States, that it can hardly be necessary to inquire whether, if a contrary view were taken of that amendment, it might not be found that there was another method of bringing this dispute before a Federal court. Suppose it to be held that suit by the Nashua Company against the agent of Massachusetts is prohibited by the Eleventh Amendment, on the ground that the suit is really against the State, and that the dispute is a matter of State concern. Now, if this is a matter of State concern for Massachusetts, why not also to New Hampshire? And if so, why may not New Hampshire avail herself of the clause in the United States Constitution extending the judicial power of the United States "to controversies between two or more States." One State may maintain a bill in equity against another to determine a question of disputed boundary.[4] Has the United States

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[1] 123 U. S. p. 500, MATTHEWS, J. (in reference to Osborn *v.* Bank of U. S. 9 Wheaton, 738). See also 2 Hare, Constitutional Law, 1058.

[2] In 9 Wheaton, p. 843.

[3] See SWAYNE, J., 16 Wallace, pp. 220, 232; MATTHEWS, J., 114 U. S. 295.

[4] Rhode Island *v.* Massachusetts, 12 Peters, 657.

Court jurisdiction of the question of interstate boundary, and no jurisdiction of the question whether the territory within the boundary shall, by the act of a neighboring State, be deprived of all which makes that territory valuable? Has New Hampshire no interest in the proposed change of one of her leading topographical features? Would Massachusetts, as a State, have no remedy in case New Hampshire should attempt to authorize the diversion of the Connecticut or the Merrimack?

We have not been fortunate enough to find much authority bearing directly on this case. The weight of judicial opinion, as thus far expressed, seems decidely in favor of the foregoing views. Indeed, it can hardly be said that there has been any considered opinion to the contrary. We will, however, comment upon two cases[1] which may possibly be claimed as tending in the other direction.

We have assumed that Brickett *v.* Haverhill Aqueduct Co.[2] will be cited as an authority directly in points against our views. But a careful examination of that case shows that the great point here in question was not raised by the plaintiff in that case; and that the case, if unfavorable to our view, is so rather from the inference to be drawn from the omission of counsel to raise the point, or of the court to allude to it, than from any authoritative decision or thorough investigation as to this subject.

A Massachusetts statute authorized the aqueduct company to take water, to a certain extent, from two ponds and a lake in Massachusetts, with a provision for the payment of damages. The company at times took more water than the statute allowed, drawing down the pond below low-water mark, in violation of the express prohibition of the statute. The outlet of the lake was a small natural stream. The plaintiff owned land, situated partly in Massachusetts and partly in New Hampshire, through which this stream flowed. The plaintiff, whose citizenship is not directly stated, contended that the taking of water by the aqueduct company had diminished the flow of water through his land, and brought, in the Superior Court of Massachusetts, a common-law action of tort for this diversion of the water of the stream. The plaintiff did not raise the question whether the Massachusetts statute could have a valid extra-territorial operation. His only objection to the validity of the statute was, that it did not con-

[1] 142 Mass. 394, and 30 Fed. Rep. 392.

[2] 142 Mass. 394.

tain such an adequate provision for the recovery of damages as is required by the Massachusetts Constitution. This was the only constitutional question to which the attention of the court was directed.

MORTON, C. J. said that where the legislature authorizes a taking of property, and provides in the statute a mode of ascertaining and recovering the damages, "such statutory remedy is the only remedy to which the injured party can resort for acts done within the authority of the statute." He then says, p. 396 (the italics are ours) : —

"It follows that the plaintiff cannot maintain an action of tort for injuries caused to him by any acts of the defendant which it was authorized to do under the statute, but his only remedy is the one pointed out by the statute."

"*The plaintiff recognizes this principle ;* but contends that the statute of 1867 is unconstitutional and invalid, *because it does not make adequate provision for the recovery of damages caused by the defendant's acts under it.*"

The opinion then considers the adequacy of the statutory provision for compensation, and holds it to be in compliance with the Massachusetts Constitution. MORTON, C. J. then adds, p. 398 :—

"We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the act is general, and puts all water rights upon the same footing, and applies to a proprietor outside the State. Such proprietor certainly has no greater rights than the citizens whose lands or water rights within the State are injured by the acts of the defendant under the authority of the Legislature. Whether the constitutional objection we have considered would be open to a citizen of another State, whose lands or water rights in that State are injured, we need not discuss nor decide.

"It follows that the plaintiff cannot maintain this action for damages caused by any acts of the defendant which are authorized by the statute."

(The remainder of the opinion is to the effect that the defendant is liable in this action for acts done in excess of its statutory powers, and that the plaintiff may recover for such damages and such only as were caused by this excess.)

The language of the court — "We do not deem it important that the land of the plaintiff which was injured was outside of the limits of the State" —must be construed with reference to the special

topic then under discussion. The plaintiff, be it remembered, was not disputing the power of the Massachusetts Legislature to pass the statute, if only it contained a sufficient provision for compensation. The sole question presented to the court by the plaintiff was that in relation to the constitutional adequacy of this part of the statute. The Court *decided* only that the location of the land was not important as bearing on the question whether this statutory provision for compensation was an adequate compliance with the requirements of the Constitution of Massachusetts; *i. e.*, that a landowner in New Hampshire cannot claim to have the Constitution of Massachusetts construed more favorably in regard to him than it would be in regard to a landowner in Massachusetts.

Banigan *v.* City of Worcester,[1] was decided by CARPENTER, J. in the United States Circuit Court for the District of Massachusetts, in 1887. The city, under a Massachusetts statute containing provision for compensation, had diverted, from a brook in Massachusetts, water which would naturally have flowed through the plaintiff's land in Rhode Island. The plaintiff did not question the power of the Massachusetts Legislature to authorize this diversion. On the contrary, he claimed the benefit of the statutory remedy, and filed a petition in the Superior Court of Massachusetts, praying for an assessment of his damages. Plaintiff subsequently removed the case to the United States Circuit Court. The city moved to remand the case to the State court, and also filed a demurrer to the petition. The question principally considered was the right to remove the case to the United States court. In an opinion of nearly two pages, a space of only fourteen lines is given to the point raised by the demurrer. It is not to be wondered at that the court was inclined to make short work of the demurrer. The objection to the petition came with a bad grace from the defendants. A decision in their favor involved one of two positions: either, (1) that their acts were not authorized by a statute, and that they were tort-feasors, liable in a common-law action of tort; or, (2) that Massachusetts had conferred upon them power to do the injury to the plaintiff without making any compensation, and without being liable in any way. It is obvious that the demurrer of the defendants to the plaintiff's petition would not be likely to call the attention of the court to the validity of the statute so fully as if the question had been raised by the plaintiff's bringing a common-

[1] 30 Fed. Rep. 392.

law action of tort against the defendants. Whether the plaintiff may elect to avail himself of the statutory remedy is one thing. Whether the plaintiff can be restricted to that remedy is another thing.

The entire opinion of Judge Carpenter on this part of the case is as follows : —

"On the demurrer the defendant alleges that the petitions show no case for relief under the statute. The argument is, that since the lands of the petitioners are in Rhode Island, and their rights in the waters of Tatnuck Brook are appurtenant to those lands, the petitioners cannot claim a remedy under this statute unless it be held to have extra-territorial effect, which, of course, is inadmissible. I cannot agree with this argument. It has been held by the Supreme Court of Massachusetts that the owner of land in an adjoining State may have, as appurtenant to such land, an interest in land or water in Massachusetts, which may be protected by suit in the courts of that State.[1] I am strongly inclined to the opinion that the decision in that case is of binding force on this court in the case at bar ; and, even if it be not so, I am inclined to follow that case as being of high authority, and well supported by the reasoning of the opinion."

With so much of this opinion as holds that the statute cannot have "extra-territorial effect," we can find no fault. Whether the learned judge means to intimate that the right of the Rhode Island landowner to have the water flow through his land is so far a property right *in Massachusetts* that Massachusetts may take away the entire right by exercising its power of eminent domain, does not seem clear. If such is his meaning, we must differ, for reasons heretofore stated. It is safe to say that this case cannot be regarded as a decisive authority, entitled to controlling weight upon the point now under consideration.

We now call attention to some authorities which tend to sustain the view we have taken of the rights of the New Hampshire riparian proprietors.

The Holyoke Water Power Co. *v.* Connecticut River Co., decided by SHIPMAN, J. in the United States Circuit Court for the District of Connecticut, in 1884,[2] strongly supports our view: This was a bill in equity for an injunction. The Connecticut Legisla-

[1] Mannville Co. *v.* City of Worcester, 138 Mass. 89

[2] 52 Conn. (Supplement) 570 ; *Same Case* (more fully reported), 22 Blatchford, 131.

ture authorized the Connecticut River Company to raise their existing dam across the river in Connecticut, in order to improve the navigation, and also maintain the water power of the Company. "The second section of the Act related to the assessment and payment of damages which should accrue to the property of any person by reason of the exercise of the powers conferred" by the Act.[1] The Connecticut River Company's dam was about sixteen miles below the dam, works, and factories controlled by the Holyoke Water Power Company at Holyoke, Mass. The Connecticut River Company proposed to raise their dam in Connecticut so high that it would produce to the Holyoke Company a pecuniary injury for a period of six or seven months in the year, by the diminution of its fall, but not by an overflow of its land. The court, following a Connecticut decision (which might not be followed in some other States), said that this was "a consequential injury," not "a taking of property." The court also said (following a Connecticut decision) that there would be no right of action, and no relief for such a consequential injury to land within the borders of Connecticut; but the court held that the Legislature of Connecticut could not authorize the doing of this consequential injury to land, or to rights connected with land, in Massachusetts. An injunction was granted to prevent the raising of the dam.

After holding that no action could have been maintained for such consequential injury to land within the borders of Connecticut, SHIPMAN, J. said: [2] —

"In this case the injury will be caused to property beyond the limits of Connecticut, and the question arises whether the doctrine which has been asserted is applicable to this state of facts.

"This question has never, so far as I can ascertain, been decided by the courts of this country. The question has arisen whether, by virtue of the right of eminent domain, one State can take, or subject to public use, land in another State, and the decisions have naturally been against such a power.[3] In two cases which have recently arisen in Federal courts, and which involved the right of a State to regulate or improve the navigation of a river wholly within its limits, the judges have carefully limited their decisions

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1 22 Blatchford, p. 135.

2 52 Conn., pp. 575, 576; 22 Blatchford, pp. 144, 145.

3 Farnum *v* Canal Co., 1 Sumner, 46; Salisbury Mills *v.* Forsaith, 57 N. Hamp. 124; Wooster *v.* Great Falls Co., 39 Maine, 245; United States *v.* Ames, 1 Wood & Minot, 76.

to the facts in the cases.[1] Important suggestions which bear upon the question in this case are made by Judge Treat in Rutz *v.* St. Louis,[2] and by Mr. Justice McLEAN, in Palmer *v.* Commissioners of Cuyahoga Co.[3]

"The rule which has been referred to" (as to non-remedy of Connecticut landowners) "is based upon the principle that the improvement of the navigation of navigable rivers within a State is part of the State's governmental duties, and that the work which is done towards such improvement is done in the discharge of the governmental powers of the State, and that the land of the riparian proprietor within the State is subject to the just exercise of this power; and that when the State undertakes to exercise its governmental power, the public good is paramount to the consequential injury of land which is incidentally and necessarily affected by the improvement. The land is under the jurisdiction of the State, and the State derives the power to inflict remote and consequential injuries upon it by virtue of such jurisdiction. The owner of land abutting upon a navigable river owns it subject to the right of the State to improve the navigation of the river, because the land is within the governmental control of the State; but it seems to me that the State obtains by virtue of its governmental powers no control over or right to injure land without its jurisdiction. Jurisdiction confers the power and the right to inflict consequential injury, but when no jurisdiction exists the right ceases to exist. It is a recognized principle that the statutes of one State in regard to real estate cannot act extra-territorially. As Connecticut has no direct jurisdiction or control over real estate situate in another State, it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land, or to rights connected with land in Massachusetts, Connecticut is acting extra-territorially.

"Let there be a decree enjoining the defendant against any further raising of its present dam and against constructing a new dam or dams to a greater height than the height occupied by the respective portions of the present structure."

Rutz *v.* City of St. Louis, 7 Federal Reporter, 438, was an action at law in the United States Circuit Court for the Eastern District

[1] Escanaba Co. *v.* Chicago, 107 U. S. Rep. 678; Huse *v.* Glover, 15 Fed. Rep. 296.
[2] 7 Fed. Rep. 438.
[3] 3 McLean, 266.

of Missouri. The plaintiff owned real estate on the Illinois side of the Mississippi River. He alleged that the city had unlawfully erected, on the Missouri side of the river, a dyke, which had caused forty acres of the plaintiff's Illinois land to be washed away. Defendant demurred; and, upon the argument of the demurrer, contended that the dyke was built under the authority of a Missouri statute, and consequently was not unlawful. The court held that the question of the lawfulness of the dyke could not be thus raised by the demurrer, and that the defendant must put in an answer setting forth its claims. But, in deciding this point, TREAT, J. said, p. 440: "Missouri cannot pass a law to govern Illinois, its citizens, and their realty situate in Illinois. If, pursuant to a Missouri statute, a dyke was erected destructive of property in Illinois belonging to the citizens of the latter State, such statute cannot be pleaded against them, for the Missouri statute could not operate extra-territorially."

The opinion of Attorney-General Franklin of Pennsylvania, given in 1855, and published in 4 Am. Law Register, 385–389, maintains the same view that we have taken of this question. And this view is also supported by the *dicta* of STORY, J. 3 Mason, p. 517, and WOODRUFF, J. 39 New York, p. 179.

George B French.
Jeremiah Smith.